

REMARKS

Claims 17-19, 21, 22 and 29-33 are pending. Claims 17-19, 21 and 22 stand withdrawn. Claims 29-34 have been rejected. Claim 34 has been canceled. No claim has been amended or added. Applicants renew their request rejoinder of claims 17-19, 21 and 22 upon allowance of independent claim 29. Reconsideration is requested.

Response to Rejections under 35 USC § 103

Claims 29- 34 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Esser (U.S. Patent No. 6,096,040) in view of Bailey (U.S. Patent No. 5,607,430), and further in view of Mennen (U.S. Patent No. 4,364,382). Applicants traverse the rejection for reasons stated below.

Claim 29 in-part recites;

29. (Currently Amended) An implant plate for stabilizing a fracture, comprising:

[] discrete receiving members protruding from said opposing side surface, located at the head-end portion and proximate to at least each side edge section, each member defining a substantially circular and circumferentially enclosed aperture through which flexible members may be passed through and tightened after the plate member has been secured to the bone surfaces, an edge circumference of each aperture having a distal curved section spaced further from said opposing side surface than a proximal curve section..

The PTO concedes that the Esser patent *does not* teach or suggest the “discrete receiving members” required by claim 29, or their location:

... Esser does not disclose discrete receiving members protruding from the opposing side surface, located at the head-end portion, and proximate to the edge, each member defining a substantially circular and circumferentially enclosed aperture through which flexible members may be passed through and tightened after the plate member has been secured to the bone surfaces, an edge circumference of each aperture having a distal curved section spaced further from the opposing side surface than a proximal curve section. (Office Action (“OA”) at 34)

The PTO relies on the Bailey patent for allegedly teaching the claimed receiving member structure missing from the Esser patent:

Bailey does teach at least one discrete receiving member protruding from the opposing side surface (Figure 1, 18 “bosses”), located at the head-end portion, and proximate to the edge, each member defining a substantially circular and circumferentially enclosed aperture (embodiment in Figure 7) through which flexible members may be passed through and tightened . . . (OA at 4).

Bailey may teach bosses, but these are not the receiving members of claim 29. As previously stated, “Each boss 18 of Bailey includes holes 22, 122 “at its ends” that respectively open proximal to oppositely arranged plate edges.”

Fig 1.

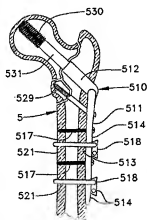


Fig. 10

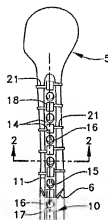
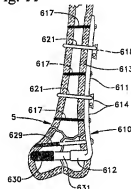


Fig. 11



The bosses 18 alternate with a series of longitudinally positioned fasteners. For example, Figure 1 appears to illustrate a bone plate of uniform width dimension that is juxtaposed against a bone shaft. With respect to Figures 10 and 11, bosses 518 / 618 are only located on the shaft portion of the plate.

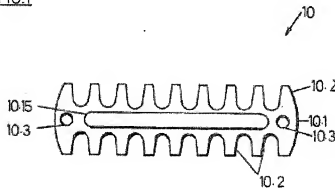
Thus, the entire boss member of Bailey extends substantially across the entire width of the plate. Consequently, the claimed feature of discrete receiving members proximate “opposite side-edges sections” is not illustrated.

The PTO also acknowledges that neither Esser nor Bailey discloses the claimed location of the receiving members:

Esser in view of Bailey does not disclose receiving members proximate to at least each side edge section.

The PTO opines that Mennen teaches receiving members proximate to each side edge section of a bone plate (see Figure 1) (OA at 4). Applicants respectfully disagree. Figure 1 of the Mennen patent is replicated below:

FIG.1



Mennen does not show discrete receiving members on opposite edges of a plate. The Mennen patent discloses adjacent fingers 10.2, with space between adjacent fingers; the adjacent fingers and intervening spaces are an integral part of the plate (2/63-3/2):

The plate 10 also has a plurality of finger members 10.2. extended along each of its longer edges. The extremity of each finger member 10.2. is bent inwardly to provide a sharpened fastening formation 10.25 pointing inwardly, the (internal) angle between the fastening formation 10.25 and the inside surface of each finger member 10.2 being W.

The spaces between adjacent fingers are not discrete members. Mennen also discloses that the ends of finger 10.2 are sharpened and bent inwardly to engage and fasten to the bone (3/18-35):

The plate 10 is then fitted over the bone 12 so as to bridge a fracture in the bone, and the plate 10 is positioned on the bone 12 as shown in FIG. 2. A securing tool in the shape of a pincer or pliers (not shown) each jaw member thereof having a smooth concave formation on the interior surface of the jaws is then placed with the concave formation in contact with each side 10.2 of the plate 10. The pincer or pliers is then squeezed to engage and penetrate each opposite pair of fastening formations 10.1 in the bone 12.

The space between the fingers 10.2 could not function as a receiving member because the patent expressly discloses crimping the fingers so the plate's width dimension is reduced and the plate is arched outwardly, thereby diminishing the space between adjacent fingers and altering the orientation of the fingers. Mennen's disclosure would direct one of ordinary skill in the art away from using the space between fingers 10.2 as a receiving member because the crimping would diminish any receiving capacity the space between fingers 10.2 might provide. Accordingly, one of ordinary skill in the art would not find the Mennen patent relevant for the PTO's purposes.

In any event; the Mennen patent specification does not appear to include any disclosure from which the PTO could glean its speculative function, *i.e.*, a receiving member, discrete or otherwise, for receiving a supplemental fastener, especially since the fingers are crimped and the plate arched as a result of the crimping. (3/36-41).

The action of the pincer or pliers referred to earlier is to reduce the diameter of the plate 10 during engagement and penetration of the fastening formations 10.25 into the bone 12. This results in an "arching" of the ridge 10.1. of the plate 10 thereby spacing the ridge 10.1. away from the crown 12.1. of the bone 12.

In re Icon Health & Fitness, Inc., 496 F.3d 1374, 1381 (Fed. Cir. 2007) ("A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant;" citing In re Gurley, 27 F.3d 551, 553 (Fed. Cir. 1994); See KSR Int'l Co. v. Teleflex Inc. et al., 127 S.Ct. 1727, 1740 (April 30, 2007) (explaining that when the prior art teaches away from a combination, that combination is more likely to be nonobvious).

Thus, the Mennen patent clearly does not provide the teachings the PTO contends that it does.

Conclusion

For reasons given above, claims 29, 31-32 and 33 are submitted to be patentable over the cited prior art, and the rejection should be withdrawn. Claims 30 and 33 both depend from claim 29, and are allowable for the same reasons. Accordingly, in view of the above amendments, Applicants submit that the present application is in condition for allowance.

In view of the above amendment, applicant believes the pending application is in condition for allowance.

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